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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local	)	CC Docket No. 96-98
Competition Provisions in the	)	
Telecommunications Act of 1996	)	

REPLY COMMENTS OF THE INDEPENDENT CABLE & TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

ICTA agrees with those parties that have urged the Commission to establish national standards to address each of the issues set forth in the NPRM relating to the development of competition in the local exchange market. Absent such national standards, CLECs will be forced to comply with varying and sometimes conflicting regulatory requirements in each of the states in which they wish to compete. In addition, many states have not demonstrated the interest or ability to implement a regulatory framework that will allow for competition in local exchange services.

To begin with, ICTA urges the Commission to establish national guidelines similar to those found in labor law for "good faith negotiations" under Section 251. The "good faith" negotiation guidelines should, therefore, require that the parties participate actively in deliberations so as to indicate a present intention to find a basis for agreement. All topics covered in Section 251 should be deemed to be "mandatory subjects of bargaining," on which parties are required to make a sincere effort to overcome obstacles or differences and do more than merely go through the motions of negotiating. Further, the guidelines should impose time constraints upon the negotiations to forestall dilatory negotiation tactics.

Second, ICTA agrees that ILEC interconnection agreements negotiated before the date of the enactment of the Telecommunications Act of 1996 should be required to be submitted to state commissions for approval. In order for CLECs to obtain interconnection on just, reasonable, and nondiscriminatory terms, it will be essential for them to know the terms and conditions that ILECs make available to one another for interconnection. ICTA also supports the suggestion that any party to an existing agreement with an ILEC should be allowed to compel renegotiation or arbitration in accordance with Section 252.

Third, ICTA agrees with the Commission's tentative conclusion that interconnection at a particular point should be considered technically feasible if an ILEC currently provides or has provided interconnection to any other carrier at that point. To ensure that such interconnection is provided, ILECs must be required to make publicly available all existing interconnection agreements, including agreements with IXC's and other ILECs, and must be required to provide at least six months notice of the specifications in future interconnection agreements absent exigent circumstances. All

required interconnection points should defined in functional terms to allow for the evolution of technology.

Fourth, the Commission should establish national guidelines for what constitutes just, reasonable and nondiscriminatory interconnection. Specifically, rates should be based on a forward-looking cost methodology, such as the total service long range incremental cost ("TSLRIC") methodology proposed by Hatfield Associates, that does not involve the use of an embedded rate base and that reflects the prices that would be charged in a competitive market. Further, all interconnection pricing must be truly nondiscriminatory. Subject to cost-based deviations only, all carriers should pay the same rate when they purchase the same facility or service from the same ILEC.

Fifth, interconnection should be equivalent technically and in terms of reliability, repair intervals, service, features, and installation intervals. The best means of ensuring that this is the case is to require that the quality of installation, repair, and service be the same as that provided to other ILECs.

Sixth, the ability to obtain effective and efficient collocation of facilities will be an important factor in determining a CLEC's ability to compete with an ILEC. For this reason ICTA supports the approach taken in the 1996 Act: Except where a CLEC has requested virtual rather than physical collocation, ILECs should be required to provide physical collocation unless they are able to demonstrate that physical collocation is not possible. Where physical collocation is not possible, or where a CLEC has requested virtual collocation in lieu of physical collocation, ILECs should be required to provide virtual collocation that is equal in all functional respects to physical collocation.

Seventh, ICTA agrees that the Commission should establish a minimum set of network elements that are required to be unbundled, including physical facilities such as the local loop and sub-loops, local switching, local transport and special access, and service network elements such as databases and signaling, voice, and database access. Pricing both for physical network elements and service network elements should be based on cost.

Eighth, ILECs must be required to offer for resale at wholesale rates any telecommunications service that they provide at retail to end users. Again, however, merely requiring resale is not enough if ILECs are able to make resale an unattractive option through anticompetitive pricing mechanisms. Thus, ICTA agrees that the establishment of national resale pricing standards based on forward-looking costs is imperative to the establishment of a competitive local exchange market.

Finally, the Commission should establish national standards regarding reciprocal compensation for transport and termination of traffic. Indeed, a *de facto* national standard already exists — "bill and keep." Bill and keep is the simplest, easiest to implement, and easiest to administer of all reciprocal compensation plans and should be the basis for the standards adopted by the Commission in this proceeding.

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The Independent Cable & Telecommunications Association ("ICTA"), submits these reply comments to the notice of proposed rulemaking ("NPRM") in the above-referenced proceeding. ICTA represents the interests of a diverse group of independent telecommunications providers serving customers throughout the United States. ICTA members, collectively, today provide what the Commission hopes that others will provide in the future — a one-stop shopping source to the consumer for broadband services. Presently, many of ICTA's members provide to their subscribers both video and enhanced telecommunications services and they will soon offer competitive local exchange services. ICTA is, therefore, vitally interested in the Commission's efforts to devise a new regulatory structure for competitive local telecommunications services.

The rules that are promulgated in this proceeding must promote the policies of the Telecommunications Act of 1996 (the "1996 Act"), which are intended to reduce the opportunity for abuse of monopoly power by the incumbent local exchange carriers ("ILECs"). The rules that will implement the 1996 Act also must provide new entrants and smaller competitors with opportunities to compete in the local exchange markets to the same extent as the ILECs, IXCs, franchised cable operators, utilities, and other large service providers.

Specifically, as more fully discussed below, ICTA urges the Commission to adopt strict, clear, enforceable national standards for interconnection; for just, reasonable and nondiscriminatory pricing; and for ILEC network unbundling. Further, the Commission must maintain a meaningful federal oversight role if the process of introducing competition in the local loop is not to be co-opted by the ILECs. In sum, ICTA believes that the Commission's implementing rules should promote the utmost in consumer choice in a manner that will encourage new entrants into the competitive telecommunications arena.

DISCUSSION

I. THE COMMISSION SHOULD ESTABLISH UNIFORM NATIONAL STANDARDS FOR IMPLEMENTING THE 1996 ACT.

In the NPRM, the Commission first seeks comment on the extent to which it should establish national standards regarding the interconnection requirements set forth in 1996 Act. ICTA urges the Commission to establish such national standards to address each of the issues set forth in the NPRM relating to the development of competition in the local exchange market.

A. Uniform National Interconnection Standards Are Necessary For The Full Implementation Of The 1996 Act.

At minimum, the establishment of national interconnection standards will create a uniform regulatory scheme that will minimize the burdens now confronting competitive local exchange carriers ("CLECs"), which now are required to modify their networks solely to be compatible with a patchwork of states regulations.[1] Indeed, a contrary conclusion would require CLECs seeking to compete nationally to conform to the standards of 50 different states. Such a result cannot be harmonized with the purpose and intent of the 1996 Act. Variations in standards from state to state are a significant barrier to competition.

The establishment of national interconnection and resale rules also is necessary to ensure that a base level of pro-competitive regulation exists beneath which no state may sink if Congress' sweeping reform of the local telecommunications markets is to be realized. By ensuring that minimum standards guarantee competitive market entry, and by allowing states to experiment with additional regulation only to the extent that it is consistent with the federal rules, new entrants can be assured of an opportunity to provide competitive services in any geographic market.

Although some states have made substantial strides toward a competitive local exchange market, others have lagged far behind. Indeed, several states have enacted

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[1] See Comments of Nextlink at 7 ("New entrants are forced to engage in the Sisyphian task of addressing each essential condition for competition in separate proceedings in multiple states"); Comments of CompTel at 20 ("Local entry will be stifled if network elements vary from state to state, or if the manner in which they can be combined into services varies from state to state.").

laws which, although facially procompetitive, in effect foreclose actual competition in the local exchange market. In Texas, for instance, recent legislation makes it possible for entities to compete with the ILECs so long as they obtain either of two certificates of authority: The "facilities-based certificate of operating authority" ("COA") or the "service provider certificate of operating authority" ("SPCOA"). The qualifications for either of these certificates, however, impose significant restrictions on new entrants which virtually guarantee continued dominance in the local exchange market by the ILECs.[2] Nonetheless, in this proceeding, the Texas PUC has filed comments lauding the Texas scheme and advocating that the FCC take a "hands-off" approach to implementation of the 1996 Act.[3] The simple fact of the matter is that most states, including Texas, have not effectively addressed the problem of promoting competition in local exchange markets that have been monopolies for three quarters of a century. The Commission should not expect that they will do so now.[4]

For these reasons, ICTA fully supports the Commission's tentative conclusion that it should adopt explicit national rules regarding those issues that are most critical to the successful development of competition at the local level. ICTA also supports the conclusion that, based on the text and legislative history of the 1996 Act, Congress intended for the Commission's implementing regulations to apply both to the interstate and intrastate aspects of interconnection. As several parties have noted, the entire structure of the Section 251 regulations would be incoherent if they were somehow to be applied only with regard to interexchange traffic.[5]

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[2] For example, applicants for the COA must deploy a network over a 27 square mile area over a six year period without reselling the services of the ILEC or any other provider. The SPCOA, on the other hand, is not available to carriers that have 6% or more of the total intrastate switched access minutes of use. The SPCOA also imposes important restrictions on resale of ILEC services. Several parties have requested that the Commission preempt the Texas scheme. See Petition of MCI for Expedited Declaratory Ruling Preempting Texas Law (May 22, 1996); Petition of AT&T for Expedited Declaratory Ruling Preempting Texas Law (May 21, 1996); Petition of Intelcom Group, Inc., and ICG Access Services, Inc., for Expeditied Ruling and Consolidation (May 20, 1996).

[3] See Comments of the Public Utility Commission of Texas at 1-2.

[4] A few states candidly admit that they simply do not have the resources to oversee properly the establishment of a complete regulatory framework for competitive local exchange service. See, e.g., Comments of North Dakota at 1-2; cf. Comments of CompTel at 21 n.17 (noting states that have deferred action on local interconnection issues pending the establishment of federal implementing regulations). Predictably, the principal proponents of a state-driven approach are the ILECs, which would prefer the Commission to maintain the *status quo*. See, e.g., Comments of Southern New England Telephone Company at 13; Comments of SBC Communications, Inc., at 6. From their perspective, of course, that would be a happy result. The 1996 Act, however, requires the Commission to reject this failed approach.

[5] See, e.g., Comments of Sprint at 7; Comments of AT&T at 3-6

Section 2(b) of the Communications Act does not undermine this interpretation. To the extent that Section 2(b) is in tension with the amendments to the Communications Act made in the 1996 Act, that Section must give way to the later and more specific legislative action. See, e.g., Crawford Fitting Co. v. J.T. Gibbons, Inc., 482 U.S. 437, 445 (1987). In fact, then, there is no conflict between Section 251 and Section 2(b). The 1996 Act confers authority upon the Commission to deal with a specific set of interconnection issues without regard to jurisdictional limitations. The 1996 Act, therefore, carves out a particular set of issues for which Section 2(b) simply does not provide the relevant jurisdictional analysis.

B. The Commission Has Enforcement Authority Over Complaints Alleging Violations Of The Section 251 Requirements.

For similar reasons, ICTA urges the Commission to exercise enforcement authority under Section 208 over complaints alleging violations of the interconnection requirements by common carriers. Although states will be primarily responsible for applying the Section 251 requirements through the arbitration and approval process, Section 208 of the Communications Act gives the Commission authority over complaints regarding acts in contravention of the Communications Act, which now includes Section 251. Nothing in the 1996 Act evidences an intention by Congress to derogate the Commission's authority under Section 208. Because the 1996 Act merely creates a new category of complaints that one may have regarding the acts or practices of a common carrier, those complaints properly should be cognizable at the Commission.[6]

This construction is not inconsistent with Section 252. As Sprint points out in its comments, the Section 252 negotiation and arbitration mechanisms relate only to agreements between ILECs and other carriers, whereas Section 251 applies to interconnection between any and all telecommunications carriers. Further, the substantive duties placed on ILECs by Section 251(c), such as the nondiscrimination requirement, are continuing in nature so that conduct violative of those duties could occur after a state commission has reviewed and approved of the underlying agreements. Finally, Section 251 imposes duties upon ILECs for which Section 252 provides no remedy, such as the duty to negotiate in good faith.[7] Thus, under the statute, it is clear that Congress intended for states to provide the primary forum for complaints regarding the terms of interconnection agreements and for the Commission to provide a forum for

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[6] See Comments of AT&T at 10-11.
[7] See Comments of Sprint at 8-9.

complaints about the state procedures themselves or about the implementation of an interconnection agreement.

This division of authority is quite sensible from a policy perspective. Compelling complainants to seek redress in each state in which they wish to compete not only would be unnecessarily burdensome, it would engender many of the same problems that the establishment of a uniform federal interconnection policy is intended to avoid. Whatever the substantive requirements of the federal standards, varying interpretations and enforcement procedures at the state level would create a chaotic regulatory environment.[8] ILECs and CLECs alike would be confronted with inconsistent and contradictory requirements from state to state.

II. THE COMMISSION SHOULD ESTABLISH NATIONAL POLICIES WITH RESPECT TO THE INTERCONNECTION REQUIREMENTS OF THE INCUMBENT LECs .

Section 251(c) of the 1996 Act imposes a number of interconnection requirements on "incumbent LECs" that are not applicable to other carriers. The Commission has asked for comment on the content of these requirements and on whether states should be permitted to "impose on carriers that have not been designated as incumbent LECs any of the obligations the statute imposes on incumbent LECs."[9]

A. States Should Not Be Permitted To Impose Section 251(c) Obligations On Carriers That Have Not Been Designated As Incumbent LECs.

ICTA strongly opposes the suggestion that states should have the option of extending the statutory requirements applicable to ILECs to carriers that have not been designated as ILECs. As the Commission recognizes in the NPRM, Congress has established different classes of carriers in the 1996 Act and set forth for each of them a different set of obligations. No such elaborate structure would have been required if Congress had intended for the same interconnection obligations to apply to each category of carriers. In addition, under Section 251(h)(2) of the 1996 Act, the Commission may, under certain circumstances, treat another LEC or class of LECs as an ILEC. There is no corresponding provision for states to redesignate LECs as ILECs. Where, as here, the statutory plan is plain, the Commission should not establish rules that themselves undermine that plan or, by their permissive nature, allow the states to do so.

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[8] See Comments of LDDS WorldCom at 17.
[9] NPRM ¶ 45.

If states were permitted to apply the provisions of Section 251(c) to CLECs, an entire segment of the market — the smaller LECs and new entrants — would be at risk. These companies hold the greatest promise for future competition in the local exchange. If required to comply with the requirements of Section 251(c), however, these smaller CLECs, which have neither the network facilities or the resources of the ILECs, could be forced out of the market before they have had a fair opportunity to compete. Thus, the Commission should construe Section 251 in accordance with its plain meaning and prohibit states from imposing the Section 251(c) obligations on any but the ILECs.

B. The Commission Should Establish Uniform National Standards Regarding The Interconnection, Collocation, And Unbundling Requirements Applicable To Incumbent LECs.

With regard to the specific incumbent LEC interconnection requirements set forth in Section 251(c), it is particularly important that the Commission establish a single federal policy for each.

1. The Commission should establish national standards regarding the content of "good faith" negotiation for interconnection.

ICTA supports the Commission's suggestion that it promulgate national standards regarding the requirement that incumbent LECs negotiate interconnection agreements in good faith. It is in the ILECs' interest to delay negotiation for pricing, products, services, and interconnection. ILECs control nearly 100% of the local exchange market in the U.S. today. More importantly, the ILECs control the principal networks through which all local exchange traffic passes. By leveraging that monopoly position and stalling in the negotiation process, ILECs may gain more favorable terms from CLECs, which urgently require access to markets. It is apparent, based on the comments filed in this proceeding, that ILECs have engaged in these and other tactics designed to slow the establishment of interconnection and to discourage competition.[10]

ICTA's members have experienced similar "bad faith" conduct in negotiations with ILECs. For instance, ILECs have used agreements that were not negotiated at arms length as templates for the interconnection agreements that they will provide to true competitors. CLECs often are helpless to combat such negotiation tactics. There is, in short, tremendous potential for abuse of a negotiation process in which the ILECs have

[10] See, e.g., Comments of TCI at 23-24 (citing examples of bad faith negotiations by ILECs).

substantially more bargaining power than the CLECs.[11] The ILECs, moreover, have, in many cases, considerable influence with state commissions and state legislators, with whom they have been dealing for many years. If the Commission allows the state commissions to be the arbiters of what constitutes "good faith negotiations," there is a substantial risk that the guidelines established will favor the ILECs at the expense of competition.

Finally, as discussed above, if the Commission allows the states to establish their own guidelines regarding the content of "good faith negotiations," CLECs and telecommunications carriers will be required to conform to a patchwork of different and sometimes conflicting guidelines. This will increase the expense for telecommunications providers to enter the market and will chill competition. Indeed, CLECs may choose not to compete in some states because of the uncertainty of successful negotiation with an ILEC or the expense of mastering the local negotiation guidelines.

Consequently, ICTA urges that the Commission establish national guidelines for "good faith negotiations" under Section 251. ICTA agrees with those parties that have urged the Commission to model these guidelines on those found in labor law.[12] The "good faith" negotiation guidelines should, therefore, require that the parties participate actively in deliberations so as to indicate a present intention to find a basis for agreement.[13] All topics covered in Section 251 should be deemed to be "mandatory subjects of bargaining," as to which parties are required to make a sincere effort to overcome obstacles or differences and do more than merely go through the motions of negotiating.[14] Further, the guidelines should impose time constraints upon the negotiations to forestall dilatory negotiation tactics. Delay serves no interest but that of the ILECs.

2. The standards regarding interconnection agreements should apply retroactively to existing ILEC agreements.

The 1996 Act requires that interconnection agreements adopted by negotiation or arbitration to be submitted to a state Commission for approval, "including any

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[11] Cf. See Comments of LDDS WorldCom at 3 (this proceeding ultimately is concerned with equalizing bargaining power between ILECs and new entrants).
[12] See, e.g., Comments of MFS Communications Co. at 12.
[13] See NLRB v. Truitt Mfg., 351 U.S. 149, 154 (1956) (Frankfurter, J., dissenting on other grounds); NLRB v. Montgomery Ward & Co., 133 F.2d 676, 686 (9th Cir. 1943); NLRB v. Wonder State Mfg., 344 F.2d 210, 215 (8th Cir. 1965).
[14] See NLRB v. Katz, 369 U.S. 736, 743 (1962).

interconnection agreement negotiated before the date of the enactment of the Telecommunications Act of 1996."[15] Despite the broad sweep of this language, it is clear Congress did not intend for every prior contract to be submitted to the states. For instance, it would make no sense to require prior interconnection agreements that have already expired to be submitted to the states for approval.

On the other hand, state review of prior ILEC interconnection agreements, including ILEC-to-ILEC agreements would provide important benefits. Because of the unequal bargaining power that now exists between ILECs and new entrants, ILEC interconnection agreements entered into prior to the promulgation of the Section 251 rules cannot be assumed to be fair, nondiscriminatory, or procompetitive. In addition, as CLECs attempt to obtain interconnection on just, reasonable, and nondiscriminatory terms, it will be essential for them to know the terms and conditions that ILECs make available to one another for interconnection. If the changes mandated by the 1996 Act are to be given effect, existing ILEC interconnection agreements must be made fully subject to the new standards. Thus, ICTA also supports the suggestion that any party to an existing agreement with an ILEC should be allowed to compel renegotiation or arbitration in accordance with Section 252.

Conversely, there is no public interest in requiring the interconnection agreements of non-ILECs that predate passage of the 1996 Act to be submitted to states for review. Such a requirement would be needlessly burdensome and would provide the ILECs with additional opportunities to slow the introduction of competition.

3. Technically feasible points of interconnection should be defined functionally to allow for the evolution of technology.

ICTA agrees with the Commission's tentative conclusion that interconnection at a particular point should be considered technically feasible if an ILEC currently provides or has provided interconnection to any other carrier at that point. To ensure that such interconnection is provided, ILECs must be required to make publicly available all existing interconnection agreements, including agreements with IXC's and other ILECs. In addition, the Commission should require that the specifications of interconnection agreements, including modifications, be made publicly available at least six months prior to the implementation of any technology. The only exception to this requirement should be for emergency changes necessary to remedy an interconnection problem that is

[15] 47 U.S.C. § 252(a)(1), (e)(1).

dangerous to health or safety or a threat to the integrity of the PSTN. In addition, emergency changes should be allowed when interconnection specifications prove to be unworkable in practice. The public and the industry should be given notice of all such "emergency" changes as far in advance as possible.

The public notice that should be required to satisfy these mandates must be "reasonably calculated to reach interested parties."[16] Ideally, a central repository would be established for all ILEC interconnection agreements so that a CLEC seeking to compete with US WEST, for instance, would not be required to investigate state records in every state in US WEST's 14 state region to have access to operative US WEST interconnection agreements. Alternatively, ILECs should provide notice of interconnection agreements through trade newspapers, technical bulletins, or the internet.

Further, ICTA agrees with the Commission's tentative conclusion that ILECs should have the burden of proving that interconnection at a point is technically infeasible.[17] ILECs should not be permitted to use disputes regarding the efficacy of a specific technology or a claim of some amorphous "danger to the PSTN" to thwart or delay competition. Legitimate disputes should be submitted to a third party industry participant, such as BellCore, and the decisions of that third party should be made available to the industry to preempt future disputes.

Finally, ICTA supports the Commission's conclusion that its interconnection point requirements must be dynamic, because technology is dynamic. The establishment of specific points of interconnection based on technology creates a risk that ILECs will use the focus on technology to slow the evolution of interconnection as technology changes. Instead, the interconnection requirements should defined in functional terms and the market should be allowed to choose the best technology to meet those terms.

At minimum, ILECs should be required to make interconnection available at the point closest to a CLEC's network or facilities at which interconnection to any unbundled element under Section 251(c) is possible and which will allow for physical or virtual collocation (discussed below) of the CLEC's facilities. Such interconnection either may be physical, for facilities and equipment, or logical, for software and databases.[18] The Commission should require that such interconnection is made available with identical

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16 Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 318 (1950).
17 NPRM ¶ 58.
18 See Comments of MCI at 12.

service parameters, at the same cost,[19] with the same level of reliability, regardless of the physical location of the interconnection point or the technology used to effectuate interconnection.

4. The Commission should ensure that the terms and conditions of interconnection agreements are just, reasonable, and nondiscriminatory.

It is not enough merely to establish interconnection requirements if "the price that new entrants must pay for their fulfillment is left uncertain and subject to ILEC manipulation"[20] or if "interconnecting carriers are disadvantaged by the terms, conditions, and arrangements for interconnection and the quality of service available to them."[21] Thus, the Commission should establish national guidelines for what constitutes just, reasonable and nondiscriminatory interconnection. Parties would be free to negotiate different rates subject to the standards in Section 252(e)(2), and state commissions could establish lower rates.[22]

a. Just and reasonable rates.

Section 252(d)(1) requires that the rates for interconnection "shall be based on cost (determined without reference to a rate-of-return or other rate-based proceeding) ... and may include a reasonable profit. It is also clear from the text of Section 251(c) that this same approach applies to rates for unbundled network elements and collocation.

To effectuate these provisions, rates should be based on a forward-looking cost methodology that does not involve the use of an embedded rate base and that reflects the prices that would be charged in a competitive market. In particular, ICTA joins with those parties that have endorsed the total service long range incremental cost ("TSLRIC") methodology proposed by Hatfield Associates. If this approach is adopted, the inquiry with regard to volume and term discounts is moot. Such discounts would be lawful only to the extent that they were conditioned on demonstrable cost savings. Moreover, for dedicated facilities, LECs should be required to offer, at least, flat rate charges. In this

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[19] As discussed further below, all interconnection should be at the ILEC's total service long range incremental costs ("TSLRIC") as described by Hatfield Associates. The TSLRIC methodology accords with the Commission's tentative conclusion that pricing for interconnection should be based on forward-looking, rather than historical, costs.
[20] Comments of TCI at 26.
[21] Comments of MCI at 38.
[22] Cf. Comments of CompTel at 76-79 (suggesting that the FCC work with states to establish benchmark TSLRIC-based rates for interconnection and network elements).

way, a connecting carrier can be sure that it is paying the full cost of the facility and no more. All costs should be calculated on an unbundled basis.

b. Nondiscriminatory rates.

There is a significant risk that ILECs will discriminate in providing interconnection against smaller companies and new entrants.[23] Although small, entrepreneurial companies bring new and innovative goods and services to the marketplace, these companies may lack the scale or market share to make, on their own, economic interconnection agreements with the ILECs.

Congress sought to foreclose this possibility in Section 251 which requires interconnection, unbundled element and collocation rates to be provided on a nondiscriminatory basis. Unlike Section 202, which merely proscribes "unreasonable discrimination," Section 251 forbids all price discrimination, including volume and term discounts that are considered lawful under Section 202. If, as ICTA and others have suggested, interconnection pricing is based on some-forward looking cost formula as applied to each unbundled element, the aggregation of elements will not result in lowered costs for the ILEC. Consequently, there should be no justification for a price reduction based on quantity.

The primary mechanism for enforcing the nondiscrimination requirement is Section 252(i), which requires LECs to make available "any interconnection, service, or network element provided under an agreement approved under [Section 252] to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." It is significant that the reach of the statutory requirement is not limited to "similarly situated" carriers or to agreements that have been executed within a certain time frame and the Commission should not impose any such limitations.

If the promise of the 1996 Act is realized, the local exchange market will not be a monopoly or duopoly market, but a fully competitive market characterized by open entry policies and vigorous competition. There will, therefore, always be "new entrants" that will have significantly less market power than some of the large, well-established competitive telephone service providers. If these new entrants are to survive and keep

[23] See Comments of Nextlink at 5 (describing a negotiation in which it was compelled to accept less than desirable terms because of its lack of bargaining power).

the market vibrant, they must be able to obtain interconnection, unbundled elements, and collocation on the same terms and conditions (contained in any operative, state-approved agreement) as their larger competitors. The use of a "similarly situated" limitation on the non-discrimination principle would undermine their ability to do so. Thus, as suggested by CompTel, the Commission should adopt the fundamental principle that, subject to cost-based deviations only, all carriers should pay the same rate when they purchase the same facility or service from the same ILEC [24]

For similar reasons, ICTA supports the suggestion that CLECs should be allowed to "pick and choose" elements from the agreements of other carriers (particularly ILEC-ILEC agreements) rather than be forced to take or leave an agreement as a whole.[25] If CLECs are not allowed to disaggregate other ILEC agreements, there is a risk that ILECs will "individualize" their interconnection agreements such that they are unavailable, as a practical matter, for other competing carriers. "Allowing carriers to pick and choose elements of other carrier's (*sic*) agreements (particularly ILEC-ILEC agreements) may be the only way that a CLEC will be able to assemble a complete interconnection agreement."[26]

5. Interconnection must be provided to all CLECs that is "equal in quality."

Interconnection should be equivalent technically and in terms of reliability, repair intervals, service, features, and installation intervals. The best means of ensuring that this is the case is to require that the quality of installation, repair, and service be the same as that provided to other ILECs.[27] Naturally, policing such a requirement will be difficult, but the public availability of ILEC-to-ILEC interconnection agreements, as suggested above, would be an important first step.

An additional prerequisite to obtaining interconnection of equal quality is that connecting carriers must be given adequate notice of changes by ILECs to their network, facilities, software, and databases. Thus, in addition to filing ILEC-to-ILEC

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24 Comments of CompTel at 106.

25 Comments of the Telecommunications Resellers Association at 51.

26 Comments of Teleport at 54 -55 & n.70. Teleport cautions that ILECs may seek to "fence off" interconnection agreements by incorporating terms that are not germane to the service being provided, but which would prevent "me-too" use of the agreement by other carriers, *e.g.*, an agreement might be limited to non-overlapping traffic.

27 Comments of Nextlink at 19.

interconnection agreements, ILECs should be required to comply strictly with the Section 251(c)(5) notice provisions.

6. The Commission should adopt national collocation standards tracking those in the 1996 Act.

The ability to obtain effective and efficient collocation of facilities will be an important factor in determining a CLEC's ability to compete with an ILEC. For this reason ICTA supports the approach taken in the 1996 Act: Except where a CLEC has requested virtual rather than physical collocation, ILECs should be required to provide physical collocation unless they are able to demonstrate that physical collocation is not possible. Further, collocation rights should not be limited in terms of particular technologies. As in the case of technically feasible points of interconnection, technologies will evolve and the collocation rules should be flexible enough to accommodate this evolution.[28]

Where physical collocation is not possible, or where a CLEC has requested virtual collocation in lieu of physical collocation, ILECs should be required to provide virtual collocation that is equal in all functional respects to physical collocation. New entrants should not suffer because physical collocation facilities are not available; nor should small companies be required to use a collocation technology that is more costly, less reliable, has fewer features, or provides inferior service because they do not have the market share to demand physical collocation space. Thus, ILECs should be required to provide virtual collocation at the same price as if the facilities were physically collocated, and it should support all of the same features and services, with the same degree of reliability, as physical collocation.

7. The Commission should establish a minimum set of network elements that are required to be unbundled.

ICTA agrees that the Commission should establish a minimum set of network elements that are required to be unbundled, including physical facilities such as the local loop and sub-loops, local switching, local transport and special access, and service network elements such as databases and signaling, voice, and database access. If connecting carriers are required to fight to establish workable rules regarding network unbundling on a state-by-state basis, the barriers to entry may become prohibitive and dominant ILECs will be able to slow or stop the development of competition.

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[28] See Comments of the Association for Local Telecommunications Services at 21.

The unbundling requirements proposed in the NPRM based on the Joint Explanatory Statement are acceptable to ICTA. However, should subdivision of these network elements prove to be a more economic, technically viable alternative, such subdivision should be required. For instance, ICTA supports the Commission's tentative conclusion that it "should require further unbundling of the local loop .... [including] access to loop feeder and distribution plant."[29] CLECs should have access to the minimum physical facilities that are required to provide the desired level of service. It has been a favorite anticompetitive tactic of the ILECs to make network elements available to competitors only in increments that are cost-prohibitive to smaller service providers. This not only stifles competition in those instances in which a provider declines interconnection because of the cost, but it leads to wasted assets in those cases in which a competitive provider proceeds even in the face of the requirement that it take more of the element than it needs.

Pricing both for physical network elements and service network elements should be based on cost. Naturally, where a service element has been further subdivided (*e.g.*, the loop has been unbundled into sub-loop elements), ILECs should be required to price the sub-elements at cost and not at the cost for the entire un-subdivided element.

As noted above, ICTA believes that the TSLRIC methodology, which focuses on forward-looking, as opposed to historical, cost considerations is the best, most fair, and most easily defined method for establishing the price of unbundled elements. If the Commission allows ILECs to use their traditional, convoluted, accounting methodology to calculate the cost of a network element, the resulting price to CLECs for unbundled elements will be excessive, competition will be delayed or destroyed, and the intention of Congress in the 1996 Act will be frustrated.

8. ILECs must be required to make all retail services available to requesting carriers at wholesale rates for resale.

Under the 1996 Act, ILECs are required to offer for resale at wholesale rates "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[30] This unambiguous requirement should be implemented through strict national resale guidelines. Resale has been the traditional method for new providers to enter established markets. For instance, the ability to offer resold

[29] NPRM ¶ 97.
[30] 47 U.S.C. § 251(c)(4)(A).

interexchange service after the breakup of AT&T helped to lower the cost of interexchange service and allowed new entrants into the long distance market. Resale will likewise help to bring immediate competition into the local exchange market that now is dominated by a single set of service providers — the ILECs.[31] For this reason, ICTA supports those parties that have advocated that the Commission prohibit all restrictions on the resale of telecommunications services by ILECs.[32]

Again, however, merely requiring resale is not enough if ILECs are able to make resale an unattractive option through anticompetitive pricing mechanisms. Thus, ICTA agrees that the establishment of national resale pricing standards based on forward-looking costs is imperative to the establishment of a competitive local exchange market.[33]

9. The Commission should establish "bill and keep" as the national standards for reciprocal compensation for transport and termination of traffic.

The Commission should establish national standards regarding reciprocal compensation for transport and termination of traffic. Many different schemes have been proposed. The simplest, easiest to implement, and easiest to administer is "bill and keep." Under bill and keep, each network recovers from its own end users the cost of both originating traffic delivered to the other network and terminating traffic received from the other network. Hence, claims that mandatory bill and keep would constituted an unconstitutional taking without just compensation, see, e.g., Comments of USTA at 84, are baseless. The compensation for transport and termination merely is paid in kind rather than in currency.

Reciprocal compensation schemes other than bill and keep will require complicated and burdensome accounting procedures to collect the required traffic information, process, bill, and reconcile the calls that transport across networks. Indeed, most networks currently lack the ability to measure the volume of exchanged traffic.[34] For all of these reasons, bill and keep is the scheme most often employed by ILECs to exchange traffic among and between themselves. Pursuant to ICTA's earlier suggestions, such ILEC-to-ILEC bill and keep arrangements should be submitted to state commissions for approval as negotiated agreements under Section 252(a)(1), and the terms of these

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[31] See Comments of MFS at 69.
[32] See, e.g., Comments of ALTS at 38.
[33] See Comments of Teleport at 55-56.
[34] See Comments of American Communications Services, Inc., at 22.

agreements should be made available on a nondiscriminatory basis to other carriers under Section 252(i).

CONCLUSION

As noted in the many of the opening comments, this proceeding is fundamentally about equalizing the bargaining power of ILECs and CLECs. History has shown that, without decisive Commission action, the ILECs will continue to stall and frustrate efforts of competitors to provide competitive choices in the local exchange market. ICTA urges the Commission to provide the leadership necessary to prevent such abuses in the future.

Respectfully submitted,

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